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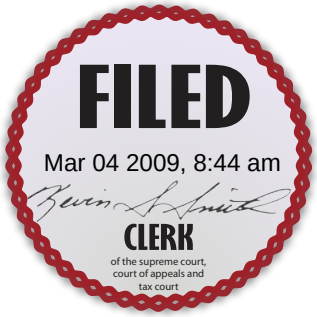

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IN THE
COURT OF APPEALS OF INDIANA

ROBERT FREEMAN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0809-CR-435
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0307-FA-48

March 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

After pleading guilty to one count of class A felony child molesting and receiving a forty-five year sentence, Robert Freeman appeals. We affirm.

Issues

Freeman presents two issues, which we restate as follows:

I. Whether the court erred in denying his motion to set aside judgment because withdrawal of his guilty plea was necessary to correct a manifest injustice; and

II. Whether his sentence was inappropriate in light of the nature of his offense and his character.

Facts and Procedural History

No transcript from the guilty plea hearing has been provided on appeal. Hence, we piece together the pertinent facts from the charging information, plea agreement, and other materials that have been presented. On July 21, 2003, the State filed an information charging Freeman with three counts of class A felony child molesting.[1] *See* App. at 7-8. Each of the three counts alleged: "On or between the dates of July 9, 1997 through July 8, 1998, at 1132 N. Portage Avenue, South Bend … [Freeman], being at least twenty-one (21) years of age, to-wit: fifty-three (53) and fifty-four (54) years of age, did perform sexual intercourse, to-wit: by placing his penis in the sex organ of [A.D.], a child then under the age of fourteen (14) years, to-wit: thirteen (13) years of age." *Id.* Freeman's step-daughter, A.D., became pregnant and, at age thirteen, gave birth. Aug. 1, 2008, Tr. at 7. Eventually, two separate

[1] Ind. Code § 35-42-4-3.

DNA tests confirmed that Freeman is the biological father of A.D.'s baby. *Id*. at 11; July 22, 2008, Tr. at 23; Appellant's Br. at 2.

In August 2003, Freeman requested and received the services of a public defender. App. at 1. In early 2004, the original public defender withdrew, and a second public defender was appointed. *Id*. at 2. In February 2006, as per Freeman's request, the second public defender withdrew. *Id*. at 4, 11. In March 2006, Freeman retained private defense counsel. *Id*. at 4.

Within a year, Freeman became dissatisfied with his private counsel. Accordingly, on March 13, 2007, private defense counsel filed a motion to withdraw appearance. The following day, the court held a hearing on the matter, denied counsel's motion, denied Freeman's request to continue the trial and hire yet another new attorney, and confirmed the trial date. Up to that point, Freeman had been granted at least a half-dozen continuances.

On March 16, 2007, Freeman, still represented by his private counsel, entered into a plea bargain wherein he agreed to plead guilty to one count of class A felony child molesting in exchange for the State's dismissal of the two other counts of class A felony child molesting. *Id*. at 5, 16-20. The four-page plea agreement set out, *inter alia*, the possible penalties for a class A felony, specified that the parties would be free to argue the appropriate sentence, and noted that Freeman would have to register as a sex offender. *Id*. at 16-19. The court found that Freeman understood the nature of the charges, possible sentence, and fines and that he knowingly, intelligently, freely and voluntarily entered into the bargain. *Id*. at 20. In addition, the court found that the plea was accurate and that there was a basis in fact for it.

Thus, the court conditionally accepted Freeman's guilty plea, ordered a presentence investigation report, and scheduled a sentencing hearing for April 27, 2007. *Id*.

Instead of attending his own sentencing hearing, Freeman disappeared, and a bench warrant was issued. *Id*. at 5; July 22, 2008, Tr. at 3. More than a year passed before police located him in Alabama and apprehended him. App. at 5; July 22, 2008, Tr. at 15. At a June 4, 2008 hearing, the court granted Freeman's private counsel's motion for withdrawal and then appointed another public defender for Freeman. Sentencing was set for July 17, 2008, but then pushed back to July 22. Despite being represented by a public defender on July 21, 2008, Freeman apparently attempted to file a pro se motion asking the judge to remove herself from presiding over his case and asking to withdraw his guilty plea.

As of the time of the July 22, 2008 sentencing hearing, the court's file did not contain a *written* motion to withdraw Freeman's guilty plea, thus the court did not grant such a request.[2] The judge refused to remove herself, then entered judgment of conviction of class A felony child molesting, and dismissed the remaining counts. A.D., by that time in her early twenties, made the following statement:

> And the fact that he has drug it out for so long proves that he has no remorse for what he's done to me, for what he's done to my son and his son and – I'm sorry. I decided I don't feel that he deserves to ever see the light of day ever again. He should pay for what he's done to me.
>
> From the time I was 12 until I was 15, I endured the worst things I can ever think of. I'm sorry. I want him to have the maximum sentence. I don't ever want there to be a chance where he can get out of jail. For the past seven

[2] After entry of a plea of guilty but before imposition of a sentence, motions to withdraw a guilty plea *must* be in writing. *See* Ind. Code § 35-35-1-4(b). After the sentencing hearing, the court followed up on the "missing July 21" pro se motion. It was located but had been file-stamped "July 22, 2008" – perhaps processed after that day's sentencing hearing. August 1, 2008, Tr. at 2, 3. Also, Freeman had not filed the required extra copies. *Id*. The Appendix in the present appeal does not contain a copy of this pro se motion.

> years, ten years, I have lived in fear that one day he could find me or my son, and knowing that he's been in jail has kept me at ease.
>
> But he has no remorse for what he's done. He doesn't think he's done anything wrong, and I was a child. I was a baby. I was looking for a father, which is, that's what he was supposed to be, and he turned it into something else. He's a sick individual.

July 22, 2008, Tr. at 10. At the conclusion of the sentencing hearing, the court ordered Freeman to serve forty-five years in prison. That same day, the court received a defense motion to set aside judgment, which the court scheduled for hearing on August 1, 2008. App. at 6, 21-24.

On July 29, 2008, Freeman filed a notice of appeal. At the August 1, 2008 hearing regarding the motion to set aside judgment, Freeman insisted that the court should have permitted the withdrawal of his guilty plea. Disagreeing, the court denied Freeman's motion. Thereafter, an amended notice of appeal was filed.

Discussion and Decision

I. Denial of Motion to Set Aside Judgment/Withdrawal of Guilty Plea

In challenging the denial of his motion to set aside judgment, Freeman argues that the court abused its discretion when it did not permit the withdrawal of his guilty plea. He characterizes his plea as the product of ineffective representation. Specifically, Freeman asserts that his conversations with private counsel were too short and that the various attorneys from the private firm did not conduct a proper investigation, let alone file the motions or take the depositions that Freeman suggested. In addition, Freeman claims he was on drugs and felt pressured to sign the plea agreement.

Preliminarily, we note that Freeman's original motion to withdraw his guilty plea was defective in that it was filed pro se when he had representation. *See Morse v. State*, 593 N.E.2d 194, 197 (Ind. 1992) (noting that courts "do not entertain pro se pleadings when counsel is involved in a case"). Moreover, at sentencing, the court's record did not contain an original or a copy of a *written* motion to withdraw guilty plea. Therefore, at that time, the court rightly did not grant Freeman's request to withdraw his guilty plea. *See* Ind. Code § 35-35-1-4(b) (requiring that after entry of a plea of guilty but before imposition of a sentence, motions to withdraw a guilty plea *must* be in writing); *Bland v. State*, 708 N.E.2d 880, 882 (Ind. Ct. App. 1999) (concluding that court did not abuse its discretion when, at sentencing, it denied an oral motion to withdraw guilty plea because it did not comply with Ind. Code § 35-35-1-4(b)).

Turning to the issue of whether the court erred in disallowing Freeman to withdraw his guilty plea, we examine Indiana Code Section 35-35-1-4. However, contrary to what both parties argue, Indiana Code Section 35-35-1-4(**b**) does not determine the outcome. As noted above, Subsection -4(b) permits a defendant to file a motion to withdraw a guilty plea "[a]fter entry of a plea of guilty, … but before imposition of sentence," and the court may allow the defendant by motion to withdraw a plea of guilty "for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea." Here, Freeman did not properly challenge his guilty plea until *after* sentence was imposed, and he did so via a motion to set aside judgment. His motion to set aside is akin to a motion to vacate judgment.

Thus, Subsection -4(**c**), *infra*, provides the applicable standard governing Freeman's request to withdraw his plea:

> *After being sentenced following a plea of guilty*, … the convicted person may not as a matter of right withdraw the plea. However, *upon motion of the convicted person, the court shall vacate the judgment and allow the withdrawal whenever the convicted person proves that withdrawal is necessary to correct a manifest injustice.* A motion to vacate judgment and withdraw the plea made under this subsection shall be treated by the court as a petition for postconviction relief under the Indiana Rules of Procedure for Postconviction Remedies. For purposes of this section, withdrawal of the plea is necessary to correct a manifest injustice whenever:
> (1) the convicted person was denied the effective assistance of counsel;
> (2) the plea was not entered or ratified by the convicted person;
> (3) the plea was not knowingly and voluntarily made;
> (4) the prosecuting attorney failed to abide by the terms of a plea agreement; or
> (5) the plea and judgment of conviction are void or voidable for any other reason.
> The motion to vacate the judgment and withdraw the plea need not allege, and it need not be proved, that the convicted person is innocent of the crime charged or that he has a valid defense.

Ind. Code § 35-35-1-4(c) (emphases added).

As per Indiana Code Section 35-35-1-4(c), Freeman's challenge is treated as a petition for post-conviction relief. Therefore, Freeman must establish his grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When the court denies relief, the petitioner appeals from a negative judgment. *Ivy v. State*, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007), *trans. denied*. Thus, we may reverse the court's decision only if the evidence is without conflict and leads unerringly and unmistakably to the conclusion opposite that reached by the court below. *Id*.

In challenging the effectiveness of counsel and the voluntariness of his plea, Freeman

must show that withdrawal of his plea was necessary in order to correct a manifest injustice. To establish ineffective assistance of counsel, Freeman must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Lambert v. State*, 743 N.E.2d 719, 730 (Ind. 2001). "Manifest injustice" is a "necessarily imprecise standard," and a trial court's ruling comes to us with a presumption that it is correct. *Ivy*, 861 N.E.2d at 1245 (internal quotation omitted).

Freeman has significantly hampered our review by failing to submit a transcript from his guilty plea hearing. Our supreme court has stated that an appellant "has the responsibility to present a sufficient record that supports his claim in order for an intelligent review of the issues." *Miller v. State*, 753 N.E.2d 1284, 1287 (Ind. 2001). "[W]ithout submitting a complete record of the issues for which an appellant claims error, the appellant waives the right to appellate review." *Id*. Absent the guilty plea hearing transcript or an affidavit from counsel, we are left with Freeman's bald assertions regarding ineffective assistance and voluntariness. Bald assertions are insufficient to demonstrate that withdrawal of Freeman's guilty plea was necessary in order to correct a manifest injustice. Accordingly, we cannot reverse the court's decision, which denied Freeman's motion to set aside judgment and withdraw his guilty plea.

II. Indiana Appellate Rule 7(B)

Freeman asserts that his sentence, which is fifteen years longer than an advisory sentence, is inappropriate. We disagree.

Indiana trial courts are required to enter sentencing statements whenever imposing a sentence for a felony offense. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id*. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. *Id*. A trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* Under the advisory sentencing scheme, trial courts no longer have any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, therefore, the weight the trial court gives to such factors is not subject to appellate review. *Id*. at 491.

The court provided a thoughtful, lengthy explanation of its reasoning before imposing sentence on Freeman:

> I don't know if you believe what you're telling me when you say that you did not molest that child, but you did. I believe the science of it, and in doing so, and in molesting [A.D.], you betrayed her trust, and that is an aggravating factor that the State of Indiana allows courts to consider in sentencing.
>
> And I understand what [defense counsel] was saying, that any child molesting is awful, and in that they all are the same. But what we all recognize is that there are some that are more awful than others, in terms of the long-term affect on a child. And those molestings which occur within the context of a family, a father, a stepfather, a grandfather, wreak more havoc on a child than

> those that are actually brought by a stranger because of this affect on the child's ability to trust. If you cannot trust the person who is supposed to be your father, the person that you're supposed to be able to go to with problems, if that's the person causing the biggest problem in your life, it has a really long-term affect on trust. So that I find to be an aggravator here.
>
> I also find it, too, an aggravator that there was a child born of the molestation of this child. [A.D.'s] body had to go though, frankly, what no 13-year-old body is supposed to go through these days, and that is child birth. She has also become, and I'm sure that your son is a joy to her, but she has become a mother at an age when she should not be a mother. She has been asked to accept adult responsibilities that she should not have been asked to accept and would not have been required to accept, but for the fact that you molested her. So I find that as an aggravator.
>
> I find further as an aggravator your prior criminal history and your subsequent criminal history and ultimately your stunning lack of remorse. So I don't know how to weigh the fact that you pled, which I'm supposed to consider as a mitigator. However, two counts were dismissed from this case, both of which could have been sentenced consecutively to the one that you did plead to, and of course you're recanting your plea.
>
> So I find it interesting that you point to the fact that [A.D.] may have told you that someone else fathered her child as a sign that she's lying, but have no problem with the fact that you've admitted to this molestation and are now recanting it as not at all conflicting. …
>
> The Courts of Appeal indicate that the maximum sentence is that which is to be reserved for the most heinous of the heinous crimes, and because of that, for as many aggravators as I find in this situation, I don't find this the most heinous of the heinous, … . I find, though, that there are significant aggravating factors in this case, and I am sentencing you on count I to 45 years. I am not suspending that sentence.

July 22, 2008, Tr. at 23-26.

Indiana Appellate Rule 7(B) allows a court on review to revise a sentence if the sentence is inappropriate in light of the nature of the offense and the character of the offender. Although Rule 7(B) does not require this Court to be extremely deferential to a trial court's sentencing decision, this court still gives due consideration to that decision. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). This court also recognizes

the unique perspective a trial court brings to its sentencing decisions. *Id*. The defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate. *Krempetz v. State*, 872 N.E.2d 605, 616 (Ind. 2007).

Regarding the nature of the offense, the advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed. *Anglemyer*, 868 N.E.2d at 494. Class A felony child molesting carries an advisory sentence of thirty years, with a fixed term of between twenty and fifty years. Ind. Code § 35-50-2-4. The court sentenced Freeman to forty-five years in prison. Freeman's offense consisted of having sexual intercourse with his stepdaughter beginning when she was approximately twelve or thirteen. Indeed, Freeman impregnated his stepdaughter, who was then forced to give birth and begin raising a child when she herself was barely a teenager.

Moving next to the question of character, we often look at criminal history. Our supreme court has emphasized that "the extent, if any, that a sentence should be enhanced [based upon prior convictions] turns on the weight of an individual's criminal history." *Duncan v. State*, 857 N.E.2d 955, 959 (Ind. 2006). "This weight is measured by the number of prior convictions and their gravity, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's culpability." *Bryant v. State*, 841 N.E.2d 1154, 1156 (Ind. 2006). The court cited Freeman's history, though it did not elaborate. The State described Freeman's criminal history as significant and consisting of "other acts that are victim related. He has domestic battery convictions. He has a handgun conviction, federal handgun conviction. He has back

in 1987 what appear to be two felonies where he was sentenced consecutively four years each." July 22, 2008, Tr. at 7, 8, 16. On appeal, Freeman neither disputed this characterization nor provided his presentence report among the materials on appeal. Other factors that reflect poorly on Freeman's character include his monumental betrayal of his stepdaughter's trust, his forcing of adult trials and parental responsibilities upon a child, his recanting of his guilty plea, his almost-never-ending delays in his case, his fleeing, and his complete lack of remorse.

Considering the nature of Freeman's offense and his character, we have no difficulty concluding that his forty-five year sentence was appropriate. *See McCoy v. State*, 856 N.E.2d 1259, 1264 (Ind. Ct. App. 2006) (affirming appropriateness of forty-five year sentence for class A child molesting committed by stepfather who impregnated thirteen-year-old stepdaughter and continued to refuse to accept responsibility for his actions); *see also Smith v. State*, 889 N.E.2d 261, 264 (Ind. 2008) (ordering stepfather to serve sixty-year sentence for molesting his stepdaughter, thereby committing a "heinous violation of trust," and displaying "utter lack of remorse").[3]

Affirmed.

ROBB, J., and BROWN, J., concur.

[3] Considering the conclusive DNA evidence and the particular circumstances of this case, Freeman's counsel seems to have provided stellar representation that resulted in a sentence less than fifty years. If not for defense attorney's negotiations to have the two other class A felonies dismissed, Freeman could have faced more than one hundred years in prison.